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Robert F. Williams

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JUSTICE ROBERT UTTER, THE SUPREME COURT OF WASHINGTON, AND THE NEW JUDICIAL FEDERALISM: JUDGING AND TEACHING*

Robert F. Williams**

The structural integrity of our federal system depends upon state constitutions and state courts providing an independent guaranty of individual rights. While the system's state constitutional component was in danger of being overwhelmed by its national counterpart, the danger has subsided with the recent rediscovery of the rich heritage and unique protections offered by our state constitutions. The trend towards development of a principled body of state constitutional law needs nurturing if it is to continue to spread and mature. Each component of a state's legal system—state bar, law schools, and judiciary—bears a measure of responsibility for breathing life into a state constitution.

Practitioners, students, and law faculty each have a unique role to play in the rebirthing process.¹

– Justice Robert F. Utter and Sanford E. Pitler, Clerk to Justice Utter, Supreme Court of Washington

INTRODUCTION

Robert Utter was appointed to the Supreme Court of Washington in 1971, at age 41, after a successful career as a trial and intermediate

* This is an expanded version of a talk given at a conference in Seattle, Washington organized by Professor Hugh Spitzer, an accomplished state constitutional law scholar, to honor the contributions of Justice Robert Utter to the field of state constitutional law, both in Washington State and the nation.

** Distinguished Professor of Law, Rutgers University Law School; Associate Director, Center for State Constitutional Studies, www.camlaw.rutgers.edu/statecon/.

1. Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 677 (1987).

appeals court judge.² This was a period when state supreme courts were undergoing an important transformation in their workload. A detailed study of that transformation concluded, in 1977, that state supreme court justices: “have come to view their role less conservatively. They seem to be less concerned with the stabilization and protection of property rights, more concerned with the individual and the downtrodden, and more willing to consider rulings that promote social change.”³

A number of factors contributed to this change, including the fact that this generation of state judges had watched the Warren Court at work,⁴ and was freed up to accept only the most important cases after the advent of intermediate appeals courts.⁵

The 1970s also brought on the “New Judicial Federalism,” a movement in which state supreme courts began to recognize that state constitutional rights provisions could be applied to provide more protection than recognized by the United States Supreme Court under the federal Constitution.⁶ This important element of American constitutionalism had always been true, but it began to be highlighted in academic writing in the 1960s.⁷ The most important factor was the 1977 *Harvard Law Review* article by Justice William J. Brennan, Jr., where he called on state court judges to “step into the breach” and interpret their state constitutions to protect individual liberties even as the United States Supreme Court became more conservative.⁸

I have previously referred to this early chapter in the New Judicial

2. CHARLES H. SHELDON, *A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT* 166 (1988) [hereinafter SHELDON, *CENTURY OF JUDGING*] (“Utter had not known the governor well and had not been active in party affairs, although a life-long Republican. Nonetheless, he had developed a reputation as an innovative and reform-minded judge. He began his judicial career as a commissioner for the King County Juvenile Court in 1959. Five years later he was elected to the Superior Court. His efforts on behalf of juvenile rehabilitation and reform were widely recognized.”); see also CHARLES H. SHELDON, *THE WASHINGTON HIGH BENCH: A BIOGRAPHICAL HISTORY OF THE STATE SUPREME COURT, 1889-1991*, at 333 (1992) [hereinafter SHELDON, *HIGH BENCH*] (short biography of Justice Utter).

3. Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 155 (1977); see also SHELDON, *HIGH BENCH*, *supra* note 2, at 19; SHELDON, *CENTURY OF JUDGING*, *supra* note 2, at 238, 340.

4. G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 PUBLIUS: J. FEDERALISM 63, 72–73 (1994).

5. This was true in Washington. See SHELDON, *CENTURY OF JUDGING*, *supra* note 2, at 227–28, 305–06.

6. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 113 (2009).

7. Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. vii, xiii (1996); WILLIAMS, *supra* note 6, at 121.

8. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

Federalism as “The First Stage: The Thrill of Discovery.”⁹ Again, although the possibility of state constitutional rights above the national minimum standard of the Federal Constitution was a truism, there nevertheless was a feeling of the “thrill of discovery” during the 1970s and 1980s.¹⁰ Justice Utter’s many contributions to this discussion, both on and off the bench, were central to this development which Justice Brennan called the “most important development in constitutional jurisprudence in our times.”¹¹ Together with state supreme court justices such as Stanley Mosk of California,¹² Hans Linde of Oregon,¹³ Shirley Abrahamson of Wisconsin,¹⁴ Ellen Peters of Connecticut,¹⁵ and Stewart Pollock of New Jersey,¹⁶ Justice Utter provided the judicial seal of approval for this recently re-discovered phenomenon.

I. JUSTICE UTTER’S BROAD ACADEMIC IMPACT

Justice Utter served not only as a Supreme Court justice, but also as an important teacher for lawyers, judges, law professors, and political scientists about this new dimension of American constitutionalism. In fact, he taught Washington State’s first course on state constitutional law at the University of Puget Sound Law School (now Seattle University Law School),¹⁷ and later courses at the other two law schools in the state

9. Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 213 (2003); WILLIAMS *supra* note 6, at 119.

10. Williams, *supra* note 9, at 213; WILLIAMS, *supra* note 6, at 119.

11. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 165 (1998).

12. See, e.g., Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985).

13. See, e.g., Hans A. Linde, *Without “Due Process”: Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970); Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379 (1980).

14. See, e.g., Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985).

15. See, e.g., Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583 (1986) (reviewing DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (Bradley D. McGraw ed., 1985)).

16. Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983).

17. SHELDON, HIGH BENCH, *supra* note 2, at 336 (“Justice Utter has earned a national reputation for his scholarly applications of state constitutional law.”).

Utter has built a solid reputation on the supreme court as an innovative jurist, creatively mixing elements of conservatism with liberalism, defying common ideological designation. On the one hand, he is a constitutional intentionist, usually associated with conservative restraintists: the intent of the framers of the state constitution should be determined and applied in constitutional cases despite the demands of the current situation. In a number of such decisions the freedoms given individuals exceed those granted by the U.S. Supreme Court. For example, Utter maintains that the founders intended in Article I, Section 7 of the Declaration

were directly modeled on his syllabus.¹⁸ He coauthored, with Hugh Spitzer, *The Washington State Constitution: A Reference Guide*,¹⁹ one of a fifty-state series. This became the go-to source for the history and judicial interpretation of the Washington State constitution.

When I was first seeking a publisher for my casebook on state constitutional law, now in its fifth edition, and seeking support for the idea, Justice Utter wrote to me in 1985:

One of the things I have observed is the lack of a textbook that would allow students and lawyers to view the subject in a systematic way. In a few states law review articles have been written which present a survey of that state's law, but these states are in the minority and they would benefit, as well, by a national overview of the subject.

In short, I support the idea of your book wholeheartedly. I believe there is a demonstrated need for it, and that conditions have changed so much in the last three years that, what may have been a questionable need then, is no longer in question.²⁰

This kind of support from the state bench for a law school course book proved invaluable.

Justice Utter made a presentation to the 1983 Annual Fall Judicial Conference in Washington on state constitutional rights adjudication,²¹ refined the presentation for a national audience at the 1984 Williamsburg

of Rights to protect the private affairs of persons and, consequently, to place greater restrictions on the intrusions of the state into one's privacy than the Bill of Rights of the U.S. Constitution requires with its absence of direct reference to the right of privacy.

On the other hand, his historical analysis of the meaning of the state constitution leads him to fear not only governmental but also private transgressions into individual freedom. State action is not a requisite for court intervention, according to justice's version of the state's fundamental law. Thus, his conservative intentionist reading of the constitution often leads to liberal results. Such an apparent confusion of ideological labels lends credence to Utter's contention that when applied to him the labels are too confining because they don't describe the dynamics of what you're working with . . . I believe that my views are really constantly evolving."

Id. at 335.

18. Letter from Hugh Spitzer, Professor, Univ. of Wash. Sch. of Law, to Charlotte Lunday, Exec. Online Editor, Wash. Law Review (Aug. 28, 2015) (on file with *Washington Law Review*); Letter from Justice Debra Stephens, Supreme Court of Wash., to Charlotte Lunday, Exec. Online Editor, Wash. Law Review (Nov. 5, 2015) (on file with *Washington Law Review*).

19. ROBERT F. UTTER & HUGH SPITZER, *THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE* (2002).

20. Letter to author from Robert F. Utter, Wash. State Supreme Court Justice (April 22, 1985) (on file with author). He knew I would attach his letter to my proposal to publishers.

21. See Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 491 n* (1984) [hereinafter Utter, *Freedom and Diversity*].

conference,²² then published it in the *University of Puget Sound Law Review*,²³ and finally included it in the published proceedings of the Williamsburg Conference.²⁴ This work reached four different audiences, and presented an early survey of almost all of the issues that would occur in state constitutional rights adjudication. It was extremely prescient in anticipating all of the big issues in state constitutional law such as lockstepping, the state action doctrine, use of state constitutional convention records, the adequate and independent state ground doctrine, and many others. As always, he was well aware of the interaction of state constitutional law with the Federal Constitution.

This veritable explosion of state constitutional law scholarship continued in his next article.²⁵ Echoing his plurality opinion in the important *Alderwood Associates v. Washington Environmental Council*²⁶ case, this article is an early and deep analysis of the issue of free speech and association on private property, where federal First Amendment protections do not apply because of the absence of state action.²⁷ The questions surrounding the requirement of state action, or a reduced level of state action, in state constitutional law are extremely important. Justice Utter also authored two exhaustive surveys of Washington State constitutional search and seizure law.²⁸

22. See Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 239 (Bradley D. McGraw ed., 1985).

To provide a forum for examining this rapidly emerging body of law and for improving communication among the states, the Conference of Chief Justices, National Center for State Courts, and Marshall-Wythe School of Law of the College of William and Mary organized a National Conference on Developments in State Constitutional Law, which was held in March 1984, in Williamsburg, Virginia. That conference, which was attended by justices representing over thirty state supreme courts and by numerous constitutional law scholars, attorneys, and others, led to this collection of essays.

DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra*, at VII.

23. Utter, *Freedom and Diversity*, *supra* note 21.

24. See DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 22.

25. Justice Robert F. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment*, 8 U. PUGET SOUND L. REV. 157 (1985) [hereinafter Utter, *Right to Speak*].

26. 96 Wash. 2d 230, 635 P. 2d 108 (1981).

27. Utter, *Right to Speak*, *supra* note 25.

28. Justice Robert F. Utter, *Survey of Washington Search and Seizure Law*, 9 U. PUGET SOUND L. REV. 1 (1985); Justice Robert F. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U. PUGET SOUND L. REV. 411 (1988). These important surveys have been updated three times by Washington Supreme Court Justice Charles Johnson, who took over Justice Utter's class at Seattle University Law School. See Charles W. Johnson & Debra L. Stephens, *Survey of Washington Search and Seizure Law: 2013 Update*, SEATTLE U. L. REV. 1581 (2013); Charles W. Johnson, *Survey of Washington State Search and Seizure Law: 2005 Update*, 28 SEATTLE U. L. REV. 467 (2005); Charles W. Johnson, *Survey of Washington Search and Seizure Law: 1998*

While serving as the Distinguished Jurist-in-Residence at the Indiana University School of Law—Indianapolis in 1987, Justice Utter acquainted the law students of his wide knowledge of state constitutional law in a lecture and later Article aimed at practitioners and future practitioners.²⁹ Five years later, he described the slow rise in awareness of state constitutional law in his State of Washington:

When I graduated from law school in 1954, there was no discussion of state constitutional law and only marginal discussion of the Bill of Rights. It was not until the late 1970s, some nine years after I first joined the Washington State Supreme Court, that parties in cases before us even began arguing for a principled basis for developing and discussing state constitutional law. . . . Even today, progress is slow. In Washington state, with three excellent law schools, there is still only one, University of Puget Sound Law School, that regularly offers a seminar course in state constitutional law. The two other law schools have interwoven portions of state constitutional law analysis into relevant classes, but offer no course focusing on state constitutional law theory and history.³⁰

In this same Article, Justice Utter joined the academic debate on the legitimacy of independent state constitutional rights adjudication, responding to the well-known challenge by Professor James Gardner, where he criticized state constitutional law cases as being without substance and state constitutions themselves as not really “constitutional.”³¹ He further provided a spirited defense of the Supreme Court of Washington’s “criteria approach” to state constitutional rights arguments when there is a similar federal constitutional provision in

Update, 22 SEATTLE U. L. REV. 337 (1998).

29. Utter & Pitler, *supra* note 1.

30. Justice Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington’s Experience*, 65 TEMP. L. REV. 1153, 1155–56 (1992) [hereinafter Utter, *Principled Decision-Making*]. “Five years later the challenge is still the same. If lawyers, students, faculty, and judges take their roles seriously, a principled development of state constitutional law in which a meaningful constitutional discourse takes place is inevitable.” *Id.* at 1167. Later, the University of Washington, in 1996, and Gonzaga, in the late 1990s, added state constitutional law courses modeled on Justice Utter’s course at the University of Puget Sound. Letter from Hugh Spitzer, Professor, Univ. of Wash. Sch. of Law, to Charlotte Lunday, Exec. Online Editor, Wash. Law Review (Aug. 28, 2015) (on file with *Washington Law Review*), Letter from Justice Debra Stephens, Supreme Court of Wash., to Charlotte Lunday, Exec. Online Editor, Wash. Law Review (Nov. 5, 2015) (on file with *Washington Law Review*).

31. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992); *see also* First Covenant Church v. Seattle, 120 Wash. 2d 203, 234–35, 840 P.2d 174, 191 (1992) (Utter, J., concurring) (citing Gardner, *supra*).

State v. Gunwall.³² In the 1986 *Gunwall* case, the Court set forth factors that could help guide the courts and lawyers in applying independent state constitutional interpretations.³³ Justice Utter strongly defended this approach in 1989 in *Sofie v. Fibreboard Corp.*,³⁴ a case relying solely on Washington's constitution to overturn legislation diminishing the jury's role in damage actions.³⁵

As with his in-depth analysis of free speech and expression on private property,³⁶ Justice Utter also provided a very detailed analysis of church and state issues in Washington as well as in a national context.³⁷ It was a vigorous call for protection of the free exercise of religion. He wrote convincingly about the role of judicial independence in state constitutional rights adjudication,³⁸ and further contended that state courts should provide interpretations of federal constitutional rights even if they are basing their holdings on similar or identical state constitutional provisions.³⁹ In all of his academic writings Justice Utter was careful to give credit to his law clerks and interns.⁴⁰ He had clerked on the Washington State Supreme Court himself.

Taken together, Justice Utter's academic writings could have formed the basis for an influential book that would still be useful today in Washington and across the country. In my teaching, scholarship and advocacy I return to his body of work often. For example, when I was working on an Article concerning "lockstepping," where state courts interpret their state constitutional provisions as identical or

32. 106 Wash. 2d 54, 720 P.2d 808 (1986); see also Hugh D. Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "Gunwall is Dead—Long Live Gunwall!"* 37 RUTGERS L.J. 1169 (2006); Utter, *Principled Decision-Making* *supra* note 30, at 1161–66.

33. *Gunwall*, 106 Wash. 2d at 61–62, 720 P.2d at 812.

34. 112 Wash. 2d 636, 663, 771 P.2d 711, 725 (1989). I have been critical of the "criteria approach, even though it provides an excellent template for advocates, because it can be read to create a presumption that United States Supreme Court interpretations should be applied to state constitutions in the absence of one of the criteria." WILLIAMS, *supra* note 6, at 146. Justice Utter made it clear that the *Gunwall* factors were "non exclusive" in his *Sofie* opinion. *Sofie*, 112 Wash. 2d at 663, 771 P.2d at 725.

35. *Sofie*, 112 Wash. 2d at 636, 771 P.2d at 711.

36. Utter, *Right to Speak*, *supra* note 25.

37. Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451 (1988).

38. Robert F. Utter, *State Constitutional Law, The United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19 (1989).

39. Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

40. For a listing of Justice Utter's law clerks, see SHELDON, *HIGH BENCH*, *supra* note 2, at 368–74.

“coextensive,” with the United States Supreme Court’s interpretations of the Federal Constitution,⁴¹ I quoted Justice Utter’s criticism of state court decisions purporting to link state and federal constitutional interpretation in the future (“prospective lockstepping”) as a virtual “rewrite” of the state constitution without a constitutional convention or the people’s consent.⁴² He had also said, more broadly:

In addition, one should be neither ignorant of nor intimidated by the case law and doctrines that may be cited by parties opposing independent interpretation. In most cases the problems they present can and should be overcome. For example, a number of Washington cases contain dicta, and sometimes actual holdings, to the effect that provisions of our constitution should be interpreted in exactly the same way that the federal courts interpret the federal Constitution, unless a very good reason for variance can be shown. While the Washington Supreme Court’s holdings must of course be followed unless overturned by that court, it is clear from a number of more recent cases that . . . supreme court pronouncements should be scrutinized to determine whether they constitute actual holdings and, if not, whether they were based on assumptions that are no longer valid.⁴³

II. JUSTICE UTTER’S STATE CONSTITUTIONAL LAW OPINIONS

Justice Utter’s 1981 plurality opinion in *Alderwood Associates v. Washington Environmental Council* provided a primer on the relationship between federal and state constitutional law in the area of free speech and association for the gathering of initiative signatures on private shopping mall property.⁴⁴ There was an obvious connection between his writing on and off the bench,⁴⁵ and he was teaching in both capacities. In *Alderwood Associates*, he made clear that there were good reasons for state courts to consider interpreting their constitutions to be more protective than the United States Supreme Court’s federal “floor”:

When the United States Supreme Court interprets the Fourteenth

41. Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?* 46 WM. & MARY L. REV. 1499 (2005).

42. *State v. Smith*, 117 Wash. 2d 263, 281–82, 814 P.2d 652, 661 (1991) (Utter, J., concurring).

43. Utter, *Freedom and Diversity*, *supra* note 21, at 507.

44. 96 Wash. 2d 230, 635 P.2d 108 (1981).

45. See, e.g., Utter, *Freedom and Diversity*, *supra* note 21.

Amendment, it establishes a rule for the entire country. . . . The court must thus establish a rule which accounts for all the variations from state to state and region to region. The rule must operate acceptably in all areas of the nation and hence it invariably represents the lowest common denominator.⁴⁶

He continued by observing: “[f]ederalism prevents the court from adopting a rule which prevents states from experimenting.”⁴⁷ In holding that citizens could gather signatures for initiative petitions in private shopping malls, Justice Utter was careful to observe that this ruling was limited because “[i]f there were no limitations to their application, every private conflict involving speech and property rights would become a constitutional dispute.”⁴⁸

Justice Utter’s colleague on the State Supreme Court, Justice Charles W. Johnson, had this to say about him:

Utter’s development of an independent interpretation of the State Constitution was probably as strong an influence on this court as could have been achieved by any individual. It was not a philosophy embraced by everyone because it’s not a comfortable philosophy. But the way Bob explained it in his writing was persuasive. As lawyers and judges, we’re most comfortable with the federal Constitution. That’s what we’re taught in law school. We’re not exposed to the State Constitution if we’re practicing law or judging at the lower court level. . . . What Bob Utter did before I came on the court was develop a language, or at least a foundation of the principles that explained not only what these words meant to the drafters but how they should be applied. And it made sense. . . . The door was not closed to the state constitutional interpretation because Bob Utter had kept it open.⁴⁹

Justice Utter was called on to author opinions in a wide range of state constitutional law matters beyond individual rights.

Early in Justice Utter’s tenure on the Washington State Supreme Court he had occasion to inquire deeply into the inherent power of state high courts to order adequate funding for their constitutional

46. *Alderwood Assoc.*, 96 Wash. 2d at 242, 635 P.2d at 115 (citing *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L.L. REV. 271, 290 (1973)).

47. *Id.*

48. *Id.*

49. *Robert F. Utter: Justice’s Sailor*, WASH. SECRETARY ST., <https://www.sos.wa.gov/legacyproject/oralhistories/RobertUtter/> [<https://perma.cc/8SSK-CG7S>] (last visited Oct. 18, 2015) (internal quotation marks omitted).

responsibilities.⁵⁰ After thorough research and analysis he concluded that the Washington Court had such inherent power to defend itself, but expressed humility in the exercise of such power by finding that the heavy burden had not been met.⁵¹

Justice Utter did not miss the circumstances where *subconstitutional* legal sources such as statutes might provide important rights protections.⁵² In *State v. Wanrow*,⁵³ for example, after performing a detailed statutory interpretation, he concluded that a taped “private communication” had to be suppressed pursuant to statute.⁵⁴ It is extremely important to remember that independent and state-specific rights guarantees can be found in a state’s statutory or common law.⁵⁵

In 1978 Justice Utter dissented from a decision upholding “lewd conduct” convictions for young women who had appeared topless in a public park.⁵⁶ He disagreed with the majority’s rejection of a defense based on Washington’s Equal Rights Amendment,⁵⁷ as well as its statutory interpretation, concluding:

If the convictions of these students are allowed to stand, these young women will carry with them throughout their lives a record of conviction for lewd conduct, yet, everyone concerned concedes that, but for the arbitrary definition of that crime which seems to have been adopted by the City of Seattle, the appellants neither acted nor intended to act in a “lewd” manner as that term is used in reference to the other acts specified. Such a criminal record, and the implication of a disposition to commit acts of extreme vulgarity which necessarily accompanies it, may do these appellants incalculable harm in future years.⁵⁸

In 1984 Justice Utter, interpreting both the Washington State and Federal Constitutions, held that a radio station could not be held in contempt for broadcasting tape recordings that had been played in open court.⁵⁹ He enunciated a very early rationale for the primacy approach where state courts evaluate state constitutional claims first:

50. *In re Salary of the Juvenile Dir.*, 87 Wash. 2d 232, 552 P.2d 163 (1976).

51. *Id.*, at 250–52, 552 P.2d at 173–75.

52. *State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977).

53. 88 Wash. 2d 221, 559 P.2d 548 (1977).

54. *Id.* at 233–34, 559 P.2d at 555.

55. WILLIAMS, *supra* note 6, at 140–41.

56. *City of Seattle v. Buchanan*, 90 Wash. 2d 584, 610–11, 584 P.2d 918, 931 (1978).

57. WASH. CONST. art. XXXI, § 1.

58. *Buchanan*, 90 Wash. 2d at 611, 584 P.2d at 931.

59. *State v. Coe*, 101 Wash. 2d 364, 679 P.2d 353 (1984).

Whether the prior restraint was constitutionally valid or invalid should be treated first under our state constitution, for a number of reasons. First, state courts have a duty to independently interpret and apply their state constitutions that stems from the very nature of our federal system and the vast differences between the federal and state constitutions and courts. Second, the histories of the United States and Washington Constitutions clearly demonstrate that the protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with our sovereignty. By turning to our own constitution first we grant the proper respect to our own legal foundations and fulfill our sovereign duties. Third, by turning first to our own constitution we can develop a body of independent jurisprudence that will assist this court and the bar of our state in understanding how that constitution will be applied. Fourth, we will be able to assist other states that have similar constitutional provisions develop a principled, responsible body of law that will not appear to have been constructed to meet whim of the moment. Finally, to apply the federal constitution before the Washington Constitution would be as improper and premature as deciding a case on state constitutional grounds when statutory grounds would have sufficed, and for essentially the same reasons.⁶⁰

He also made sure to note that the decision was based on “‘bona fide separate, adequate, and independent [state constitutional] grounds.’”⁶¹ Therefore, the Washington State Supreme Court decision was final and could not be taken to the United States Supreme Court because there was no federal question.

Finally, he articulated his “dual analysis” approach in which he analyzed federal constitutional law even though the case had already been decided on state constitutional grounds:

First, our reasoning may be of aid to other courts with similar problems who do not have state constitutional provisions similar to ours and must rely on the appropriate federal constitutional provisions and decisions. Second, although the federal cases in no way influenced our decision under the Washington Constitution, such a discussion demonstrates that federal

60. *Id.* at 373–74, 679 P.2d at 359; *see also* *City of Seattle v. Mesiani*, 110 Wash. 2d 454, 456, 755 P.2d 775, 776 (1988).

61. *Coe*, 101 Wash. 2d at 377, 679 P.2d at 361 (citing *Michigan v. Long*, 463 U.S. 1032 (1983)).

constitutional law also forbids a court to impose prior restraints on the publication of information lawfully obtained at public court proceedings.⁶²

When his colleagues on the Washington State Supreme Court struck down the use of state financial vocational assistance to a blind student who wished to study to be a pastor under the First Amendment, Justice Utter dissented both as a matter of federal constitutional law and also state constitutional law, providing an exhaustive analysis of Washington's constitutional religion guarantees.⁶³ The Court's federal constitutional ruling, however, was not based on an adequate and independent state ground and was reversed by the United States Supreme Court.⁶⁴ On remand, the Washington State Supreme Court reinstated its prior decision, but this time relied on the Washington Constitution's religion provisions.⁶⁵ Again, Justice Utter dissented, first arguing that the majority had not performed a proper *Gunwall* analysis (the Court's earlier articulated approach to state constitutional rights claims),⁶⁶ and then again delving very deeply into Washington's constitutional religion provisions.

In *Sofie v. Fibreboard Corporation*, Justice Utter struck down a "tort reform" cap on noneconomic damages in personal injury or wrongful death litigation.⁶⁷ In this area, where the federal Seventh Amendment right to jury trial has not been applied to the states,⁶⁸ it is only state constitutions that protect the right to jury trial in civil cases.⁶⁹ Justice Utter provided a detailed analysis of the Washington Constitution's jury trial guarantee, concluding that the challenged cap unconstitutionally deprived the jury of its authority to award damages.⁷⁰

In *Foster v. Sunnyside Valley Irrigation Dist.*,⁷¹ Justice Utter held that a voting scheme in a special irrigation district where certain property owners could not vote for the District's board members violated the

62. *Id.* at 378, 679 P.2d at 361–62; *see also Mesiani*, 110 Wash. 2d 456–57, 755 P.2d at 777.

63. *Witters v. State, Comm'n for the Blind*, 102 Wash. 2d 624, 630–31, 689 P.2d 53, 57 (1984), *rev'd* 474 U.S. 481 (1986).

64. *Witters v. Wash. Dep't of Serv. for the Blind*, 474 U.S. 481, *reh'g denied* 475 U.S. 1091 (1986).

65. *Writers v. State, Comm'n for the Blind*, 112 Wash. 2d 363, 368, 771 P.2d 1119, 1121 (1989).

66. *Id.* at 373–74 (Utter, J., dissenting); *see also supra* notes 31–33 and accompanying text.

67. *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711 (1989).

68. *Id.* at 644, 771 P.2d at 716.

69. *See id.*; Robert F. Williams, *Foreword: Tort Reform and State Constitutional Law*, 32 RUTGERS L.J. 897 (2001).

70. *Sofie*, 112 Wash. 2d at 668–69, 771 P.2d at 728.

71. 102 Wash. 2d 395, 687 P.2d 841 (1984).

State constitution's mandate of "free and equal" elections.⁷² This would have been permissible under the United States Supreme Court's interpretation of the Federal Constitution,⁷³ but, as Justice Utter pointed out, the federal Constitution does not contain a "free and equal" elections clause and, therefore, the "Washington constitution goes further to safeguard this right than does the federal constitution."⁷⁴ This kind of careful textual comparison of state and federal constitutional provisions has become a central feature of state constitutional analysis.

CONCLUSION

In 1995, after twenty-three years on the Washington State Supreme Court, and despite his obvious love for teaching and judging, Justice Utter resigned from the Court in protest of the continued use of capital punishment in Washington.⁷⁵ His numerous dissenting opinions from the Court's death penalty decisions had not proved to be enough for him; he believed he could no longer participate in the judicial imposition of capital punishment. Thus, we were all deprived of his likely future contributions to state constitutional law as a sitting justice. Still, he has left us a prodigious amount of highly influential material relating to virtually all of the key issues that will continue to influence the area of state constitutional law far into the future.

72. *Id.*

73. *Foster*, 102 Wash. 2d at 403–04, 687 P.2d at 846–47.

74. *Id.*

75. *Robert F. Utter: Justice's sailor*, WASH. SECRETARY OF ST., <https://www.sos.wa.gov/legacyproject/oralhistories/RobertUtter/> [<https://perma.cc/8SSK-CG7S>] (last visited Oct. 18, 2015).